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THE EVOLUTION OF A COLLECTIVE BARGAINING RELATIONSHIP IN PUBLIC EDUCATION: NEW YORK CITY'S CHANGING SEVEN-YEAR HISTORY

*Ida Klaus**

I. EARLY FORCES

THE bargaining relationship between the New York City Board of Education and its teachers had its roots in the social forces of the mid-fifties and its formal origins in the events of the early sixties. The relationship came about without benefit of law or executive policy. No law permitting public employees to bargain collectively was in effect anywhere in those years, and Mayor Wagner's 1958 Executive Order—the culmination of three years of study and public inquiry—did not apply to teachers.¹ Instead, the impetus came directly from the persistent and increasingly powerful drive of the teachers themselves. They demanded a substantial voice in the determination of their salaries and, through improvement of their working conditions, enhancement of their stature as professionals. Ignoring the prohibitions of state law, they chose the strike as their pressure technique.² Two work stoppages³ in the 1959-60

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1. Executive Order on City Employee Relations (March 1958). This order covers only those city employees who were under the direct control of the Mayor. It established for those employees a system of labor relations similar in many fundamental respects to that prevailing under federal and state law for private workers. Although Board of Education employees were not among those who would be covered by the Mayor's program, two organizations representing New York City teachers nevertheless participated in the public hearings which led to the adoption of the order. The one, representing only high school teachers and since defunct, stressed the separate professional, rather than trade-union, interest of teachers. The other, since merged into the present dominant United Federation of Teachers, expressed the hope that the hearings would point the way to effective collective bargaining for all nonsupervisory pedagogical employees in a single unit. See I. Klaus, Report on a Program of Labor Relations for New York City Employees (New York City Department of Labor, June 1957).

2. The so-called Condon-Wadlin Law, Law of March 27, 1947, ch. 391, [1947] N.Y. Laws 842, *as amended*, Law of April 23, 1963, ch. 702, [1963] N.Y. Laws 2432 (repealed 1967), adopted in 1947 as a part of the Civil Service Law, banned all strikes by public employees and imposed severe penalties upon individual workers for engaging in the proscribed conduct. The Governor's message accompanying his approval of the measure declared the philosophy underlying the legislation to be that the public service, in all its aspects, is "a public trust in behalf of all the people" and that "a trustee cannot strike or falter in the performance of his duties."

3. The first strike, which lasted for about three and a half weeks in February 1959, was limited to evening high school teachers who sought an increase in their rates of pay.

period signaled three important facts: (1) that the teachers were grimly serious about obtaining improvements in their welfare; (2) that they were strongly determined to achieve those improvements through collective bargaining by a duly chosen representative; and (3) that they would not tolerate further vague promises and tactical delays by the City Board of Education.

A. *Basic Attitudes and First Steps*

In 1961, a newly constituted and appointed New York City School Board gave highest priority to meeting the teachers' requests. Within a few months, the new Board had declared a clear policy of exclusive recognition for collective bargaining purposes; had implemented that policy by formal hearing and election procedures; had overcome earlier obstacles to determining appropriate bargaining units, voting eligibility requirements, and qualifications for organization participation; and had recognized the employees' majority choice, the United Federation of Teachers, Local 2, American Federation of Teachers, AFL-CIO,⁴ as the exclusive bargaining representative of all classroom teachers.⁵

The second strike was called on November 7, 1960, by the American Federation of Teachers affiliate and predecessor of the present United Federation of Teachers. It sought to obtain for the teachers' representatives some form of recognition in dealing with the Board on salaries and on the improvement of working conditions. The strike was terminated after one day when a three-man panel of prominent labor leaders was appointed to inquire into the basic causes of the strike and the areas of teacher dissatisfaction. Thereafter, the panel was to make recommendations for the improvement of teacher-Board relations. The panel recommended a policy and program for the recognition and participation of teacher organizations. For months thereafter, the Board refused to declare and implement an unequivocal policy. Instead, it sought by various means to ascertain preliminarily the sentiments of its teachers and other pedagogical employees. Finally, in June 1961, it formulated a proposed policy for collective bargaining founded upon exclusive recognition of a bargaining agent chosen by the majority of employees. The policy was to become operative, however, only if it were established in a referendum that a majority of employees actually wished to have collective bargaining. Over 70 per cent of those participating in the preliminary referendum voted in favor of collective bargaining as defined by the Board. See 1962-1963 Agreement Between The Board of Education of the City of New York and United Federation of Teachers, AFL-CIO, Covering Classroom Teachers (signed Oct. 18, 1962) (a copy of this agreement is on file with the *Michigan Law Review*).

4. This organization is referred to hereinafter as the Union, the United Federation of Teachers, or the UFT.

5. The Board members turned the resolution of the representation question and all related matters over to the City Department of Labor. The two most difficult issues which had blocked a rational and expeditious application of the new policy in favor of exclusive recognition were the designation of an appropriate unit and the qualification of contending organizations to represent employees for bargaining. A system-wide unit of classroom teachers was found most conducive to the prompt and effective institution of collective bargaining. Contending organizations were deemed qualified if they met three basic tests: (1) nondiscriminatory admission to membership; (2) capacity to act as a collective bargaining representative for all employees

Then, early in 1962, the Board of Education and the Union took the first steps toward establishing what is now probably the most advanced and critical collective bargaining relationship anywhere in public education, if not in the public service generally. The relationship—and especially the collective bargaining agreements by which it has been governed—have served as the model for school districts and other teacher groups.⁶ Most teacher-board agreements in other large cities which are executed as the result of negotiations are plainly molded in the image of the basic New York City parent agreement.⁷

The New York City relationship was founded as much on the solid commitment of the Board of Education to the conceptual and practical responsibilities of collective bargaining as it was on the firm dedication of the teacher leadership to the correspondingly full harvest of substantive and procedural advantages which collective bargaining was expected to bring. Thus, each side entered upon this novel joint endeavor with its own understanding of how both would work together to fashion a new employee-relations “constitution” to govern the special public enterprise of which they were a part. It is hard to say whether either party foresaw at that time how the dynamics of the continuing relationship and the shadows already cast by oncoming social changes would expand the framework of the “constitution” and foster the emergence of a solid “common law” of the enterprise.

Trial, conflict, and combat—resolved in the end by a basic determination on both sides to make the joint venture work—have

involved; and (3) capacity and disposition to represent equally all within the unit. A mail-ballot election among the then approximately 40,000 teachers in the unit resulted in a majority vote for the United Federation of Teachers as against two other organizations and a “none” choice. For a more detailed account of the technical aspects of the resolution of the preliminary issues, see 1963 PROCEEDINGS OF THE AMERICAN BAR ASSOCIATION, SECTION OF LABOR RELATIONS LAW, REPORT OF THE COMMITTEE ON LAW OF GOVERNMENT EMPLOYEE RELATIONS.

6. Upon the conclusion of the second agreement in 1963, the American Federation of Teachers prepared and distributed in other areas of the country a special bulletin entitled *Collective Bargaining for Teachers—the New York City Contract*. The bulletin pointed out the highlights of the new agreement and noted: “Teachers everywhere are studying the contract in expectation of future advancement in their own school districts.”

7. The model has been followed by both American Federation of Teachers and National Education Association affiliates. See, e.g., contracts in Detroit, Boston, Philadelphia (all American Federation of Teachers affiliates) and Newark, New Jersey, and New Haven, Connecticut (the former a National Education Association constituent and the latter a National Education Association constituent for a time). While the substance of the New York City agreement has not yet been borrowed by other countries, a possible first known step in that direction has been taken in Japan where one of the early New York agreements has been translated into Japanese.

marked the seven-year history of the relationship and shaped the characteristics it has assumed in the process of continuing growth and cautious adjustment. For the teachers, this seven-year history has been a story of how from the beginning they won important psychic and economic gains, and found new professional freedoms and security. For the Union, it has been a series of encounters in the teachers' behalf along the road to tremendous power in the administration of the school system. For the Board and the administrators, it has been an account of how they met new challenges to established concepts and practices in the governance of the schools, and how they reshaped attitudes in the conduct of their relations with teachers. For the community, it has provided not merely a perennial source of anxiety about whether and when the schools would open, but also an impetus toward asserting its own separate interests in the outcome of the bargaining.

B. *The Growing Process and the Stages of Evolution*

The teacher-board relationship developed through three distinct but interrelated processes: (1) joint negotiation at the bargaining table by which the basic terms and conditions of teacher service are determined and then reduced to a written collective bargaining agreement; (2) actual day-to-day application and administration at the school (and other) levels of the terms and conditions agreed upon; and (3) active consultation between appropriate representatives of both sides on matters of mutual concern which are either not properly within the scope of collective bargaining, or are not susceptible to appropriate adjustment at the bargaining table, or should not be deferred for consideration until the opening of formal periodic negotiations. This Article deals primarily with the first process. But where important, it also attempts to show the interaction of all three.

The New York City Board of Education has negotiated four classroom teacher agreements:⁸ the first in 1962,⁹ for a one-year term commencing July 1, 1962; the second in 1963,¹⁰ for a two-year term beginning on July 1, 1963; the third in 1965, covering a two-year

8. In addition to the agreements covering classroom teachers, the AFL-CIO has also entered into agreements with the board covering school secretaries, psychologists and social workers, laboratory assistants and laboratory technicians, day school counselors and per session counselors, auxiliary teachers (bi-lingual teachers), and attendance teachers.

9. 1962-1963 Agreement, *supra* note 3.

10. 1963-1965 Agreement Between The Board of Education of the City of New York and United Federation of Teachers, AFL-CIO, Covering Classroom Teachers (signed Feb. 10, 1964) (a copy of this agreement is on file with the *Michigan Law Review*).

period starting on July 1, 1965;¹¹ and the fourth and current one¹² for a twenty-six-month period commencing July 1, 1967, and ending with the beginning of the next school year in September 1969. Each agreement has built upon and expanded its predecessor. Each agreement, and the negotiations from which it emerged, marks a distinct and progressive stage in the evolution of the Board-Union relationship. As original documentary sources, the four agreements themselves provide much internal evidence of the organic growth of the relationship. However, the agreements alone do not reflect the complete history out of which they arose. The form, the style, and the content of these documents have their origins in external surrounding circumstances which serve to illuminate the writings and, hence, the relationship itself.

II. THE FIRST STAGE: EXPLORATION AND EXPERIMENTATION

The first stage in the relationship, which commenced early in 1962, consisted of the initial encounter between School Board and Union, the course of the negotiations between them, and the emergence of the first agreement. Although far from amateurs, both the Board as employer and the Union as agent for the teachers entered upon their respective responsibilities in a relatively simple and comparatively primitive way. Almost immediately after a formal ceremony in which the Board officially recognized the Union's status as the exclusive bargaining representative for all of New York's then 43,000 public school teachers, the UFT presented some 160 demands to the Superintendent of Schools. At that point, the Board was faced with the hard realities of translating into practice the theory of its new policy. What were the basic mechanics and the guiding substantive principles for the initiation and conduct of a bargaining relationship in public education? Other spheres of public employment offered little, if any, guidance. It was a matter of breaking new ground—as much for the Union as for the Board. A number of Board members were well acquainted with the process and the institution of collective bargaining in the world of industry. The UFT, indeed, drew considerable advice and assistance from the trade union move-

11. 1965-1967 Agreement Between The Board of Education of the City of New York and the United Federation of Teachers, AFL-CIO, Covering Day School, Classroom Teachers and Per Session Teachers (signed Nov. 24, 1965) (a copy of this agreement is on file with the *Michigan Law Review*).

12. 1967-1969 Agreement Between The Board of Education of the City of New York and United Federation of Teachers, AFL-CIO, Covering Day School, Classroom Teachers and Per Session Teachers (signed Dec. 6, 1967) (a copy of this agreement is on file with the *Michigan Law Review*).

ment of which it was a part. Hence, both sides set about adapting established private-sector concepts to the peculiar characteristics of this special public enterprise; the process of accommodation was a pragmatic one of informed improvisation. On the Board's side, the heaviest burden fell first on the Superintendent and then on the nine Board members, all of whom became personally involved in the negotiations.

The most important issue was, of course, salary. On this subject, Board members met with the Union committee far into the night in numerous negotiating sessions. A significant difference between government and private industry brought on an early disagreement about the timing of the salary negotiations in relation to the budget-making process.¹³ The final allocation of funds to the Board for the next fiscal year had not yet been made when the negotiations began. The Board nevertheless felt that it could proceed to discuss salaries and other monetary items within the framework of realistic estimates of future income based on experience. The Union disagreed. It regarded negotiations under circumstances short of fiscal certainty as a mere game which gave little promise that the chips would ever be cashed in. Nevertheless, the bargaining on salaries proceeded, moving into high gear after the Mayor advised the Board of its operating budget for the following school year. The Union thereupon insisted on a substantial upward revision of the salary schedules, and the Board offered what it felt it could afford to pay within the limitations of its budget and of anticipated additional funds. The stalemate brought on a one-day strike that closed most New York City schools. The Union terminated the work stoppage in obedience to a court injunction and decision which declared the strike illegal under the state's so-called Condon-Wadlin Law.¹⁴ Following the strike, the parties agreed on a very favorable salary structure after the Governor discovered that he could make additional state funds available to the Board for that year.¹⁵

Other teacher demands for long-awaited improvements in working conditions presented the challenge of how to accommodate col-

13. For a discussion of this and other aspects of the special problems connected with public sector bargaining, see Address by Ida Klaus, *The Emerging Relationship, Conference on Public Employment and Collective Bargaining*, University of Chicago, Feb. 5, 1965. See also Rehmus, *Constraints on Local Government and Public Employee Bargaining*, 67 MICH. L. REV. 919 (1969).

14. Law of March 27, 1947, ch. 391, [1947] N.Y. Laws 842, as amended, Law of April 23, 1963, ch. 702, [1963] N.Y. Laws 2432 (repealed 1967). This was the only occasion on which the Union was to heed a court directive forbidding a strike.

15. The Union, which claimed credit for unearthing the Governor's cache, evinced an early talent for the game of the political treasure hunt in public employment negotiations.

lective bargaining to the Board's internal budget-making responsibility. That responsibility required the Board, once monies were made available to it for the ensuing fiscal year, to adopt its own internal operating budget for the year by allocating specific funds for designated school-system purposes. Among other important benefits, the Union sought during the first year of bargaining a reduced teaching schedule for teachers in the elementary and junior high schools, relief from unpleasant custodial and monitorial tasks known as "nonteaching chores," and a daily duty-free lunch period in the elementary schools. The Board acknowledged both the need for these changes and its willingness to bring them about. The problem was how to accomplish those objectives through the new mechanism of collective bargaining and at a cost which the Board could afford. The solution agreed upon was that both parties would jointly assume the burden of internal budgetary allotments within the limits of existing funds. The parties thus proceeded to negotiate a schedule of the amounts of money which the Board would spend on each desired improvement. The scheduled amounts agreed upon as well as the new salary terms were embodied as separate budget items in a formal Board resolution adopted in June 1962, just before the commencement of the next fiscal year. The resolution authorized the expenditure of stated sums of money for specified purposes to accomplish nine types of improvement in teacher working conditions. Three examples will illustrate how the parties subsequently translated the jointly negotiated budget into teacher benefits in the collective bargaining agreement: (1) the budget authorized the sum of 523,276 dollars to hire 116 additional teachers in order to accomplish a "Reduction of Teacher Instructional Load" in certain kinds of junior high schools from twenty-five to twenty-three or twenty-four periods per week;¹⁶ (2) it authorized the sum of 1,903,000 dollars to hire school aides in the elementary and high schools and, on a limited basis, in the junior high schools, "[t]o perform other than teaching chores now carried out by instructional staff";¹⁷ and (3) it authorized the sum of 1,831,466 dollars to hire 406 elementary school teachers in specialized areas in order "to make time available for relief of the classroom teacher, one . . . period per week."¹⁸ When the parties drew up the first contract in September, they incorporated the items already specified in the budget resolution for the improvement of working conditions into the collective bargaining agree-

16. See 1962-1963 Agreement, *supra* note 3, art. IV, § A(1).

17. See *id.*, art. IV, § A(3).

18. See *id.*, art. IV, § A(2).

ment as teacher benefits tied in amount to the budgetary allotments made in the resolution. For example: the collective bargaining agreement provided for the reduction of teaching periods in certain junior high schools "to the extent permitted by" the June budget allotment for that purpose.¹⁹ Similarly, the Board undertook in the agreement to grant relief from nonteaching chores through implementation of "the budgetary item as to school aides" authorizing the hiring of nonteaching personnel to perform those tasks.²⁰ Finally, the obligation to grant preparation periods in the elementary schools was tied to the amount of money made available in "the budgetary item as to increased specialized service."²¹ In this way the parties negotiated from knowledge of the amount of money available, and the Board was not committed to promoting improvements beyond its budgetary capacity. However, each individual teacher had no assurance of any specific benefit.

Another aspect of the first bargaining experience was the formulation of a grievance procedure. The parties agreed upon a very detailed procedure which ended, for all grievances based on the application or interpretation of the "working conditions" terms of the contract, with a carefully prescribed recourse to final arbitration by a neutral outsider chosen by both sides. Arbitration of this kind was at that time a bold and pioneer experiment in government;²² both sides were aware that they were breaking new ground. The Board was ready to defend the arbitration provision against the possible attack of illegal delegation of its authority. In return, it sought and obtained from the Union the inclusion of a broad no-strike clause in the agreement.²³ The Union hailed the grievance procedure as the most significant aspect of the new relationship.²⁴ It assured its mem-

19. *Id.* art. IV, § B(2)(b).

20. *Id.* art. IV, § B(3)(c).

21. *Id.* art. IV, § B(3)(b).

22. On the status of arbitration in government employment as of that time, *see* NEW YORK CITY DEPARTMENT OF LABOR, UNRESOLVED DISPUTES IN PUBLIC EMPLOYMENT (1955); PRESIDENT'S TASK FORCE ON EMPLOYEE-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE, A POLICY FOR EMPLOYEE-MANAGEMENT COOPERATION IN THE FEDERAL SERVICE 18-19, 22-23 (1961).

23. The provision, entitled "No-Strike Pledge," reads as follows:

The Union and the Board recognize that strikes and other forms of work stoppages by teachers are contrary to law and public policy. The Union and the Board subscribe to the principle that differences shall be resolved by peaceful and appropriate means without interruption of the school program. The Union therefore agrees that there shall be no strikes, work stoppages, or other concerted refusal to perform work, by the employees covered by this agreement, nor any instigation thereof.

1962-1963 Agreement, *supra* note 3, art. XIV.

24. The October 1962 monthly bulletin of the United Federation of Teachers, UNITED ACTION, reported to its members:

bers, however, that "we have not renounced our right to take whatever action we deem to be the most effective in support of the negotiations for a new contract when this contract expires."²⁵

Upon completion of the negotiations, all items of agreement were brought together into a single document in the form and style of a collective bargaining agreement²⁶ covering thirty-eight printed pages. On October 18, 1962, the Union and the Board formally signed the agreement²⁷—the first document of its kind in the history of public education. The Union framed the signed agreement and hung it on its headquarters wall to commemorate the genesis of the bargaining relationship and perhaps to symbolize the solemnity of its pledge to its members that "[f]rom this time on, a Union contract will be a condition and the basis under which we perform our professional duties and set our professional standards."²⁸

III. THE SECOND STAGE: CRISIS AND TURNING POINT

Negotiations for the second agreement started earnestly in January of 1963, about three months after the first agreement had been signed. The Union submitted salary proposals and demands for further improvements in working conditions and changes in established practice.

The first-round problems of accommodating the changes in working conditions to the Board's budget-making authority and financial ability assumed different proportions in the second stage. The negotiations were now looking toward an agreement for a two-year term. The Union, moreover, was asking for definite commitments on salaries and working conditions in each year—without conditioning their extent on the availability of funds. In other words, the teachers now wished to negotiate directly for improvements in their welfare. They wanted the substance of change and were leaving the financial means and budgetary consequences to the Board's ingenuity. As a result, the Board not only had to anticipate the amount of operating funds it might receive for the second year, but it was also faced with the necessity of obligating those future undetermined funds. Ability to pay thus remained a fundamental factor in the Board's negotiating

The Grievance Procedure is the heart of the union contract. To most teachers, the effectiveness of the United Federation of Teachers will be judged by its ability to settle grievances. The grievance procedure reflects, more clearly than anything else, the great change made since the day when the Board made all the decisions; when the teacher was strictly at the mercy and whim of his principal.

25. United Federation of Teachers, *UNITED TEACHER*, Oct. 1962.

26. 1962-1963 Agreement, *supra* note 3.

27. The contract was for a term of one year, retroactive to July 1, 1962.

28. United Federation of Teachers, *UNITED TEACHER*, Oct. 1962.

position. For example, on the question of additional nonteaching and preparation periods, the dispute centered on the Board's ability to provide a definite number of such periods. In the end, the parties reached a compromise: for the first year of the agreement the Board would provide the elementary school teachers with a specific number of preparation periods "to the extent possible";²⁹ however, for the second year of the agreement the teachers had an outright guarantee of a given number of periods which was subject to the grievance procedure.³⁰ In the junior high schools, the Board promised a definite number of periods during the first year and a further limited increase in the second year "to the extent that funds are made available."³¹

Although the parties remained far apart on the matter of salaries until the eleventh hour, they did not face the same tactical problems of synchronization with the budget-making process as they had met the year before. In order to obtain a two-year contract and to absorb most of the increased salary costs in the second year, the Board was prepared to take its chances that its estimates of future financial ability were accurate. If necessary, it would have to divert to salaries and other negotiated items funds that would otherwise be utilized for other educational needs and services.³² The result was a shift in the order of priorities.³³

The main field of conflict during the second year concerned an extremely grave and difficult area in public education: the proper scope and boundaries of collective bargaining. Where is the line between what is primarily within the sphere of working conditions and hence subject to negotiation and bilateral decision, and what is essentially within the realm of educational policy and hence within the exclusive authority of the Board or the Superintendent

29. 1963-1965 Agreement, *supra* note 10, art. IV, § A(3)(b).

30. *Id.*

31. *Id.* art. IV, § A(2)(b).

32. See Rehms, *supra* note 13.

33. The Board in fact negotiated with the Union the order of priorities for the disbursement of the moneys that would be made available to the Board in its budget for the second year of the agreement. The arrangement read as follows:

BASIC FORMULATION OF SALARY INCREASE POLICY

Expense budget funds made available to the Board for the 1964-65 fiscal year will be allocated in the following order: First, funds will be allotted to continue programs and activities at the level in operation during 1963-64. Second, funds will be allotted for salary increases for the bargaining unit as stipulated in this agreement, and twice this amount will be allotted for derivative costs and increases as determined by the Board and for other educational improvements. Third, any residual funds will then be allotted in the same proportion as provided in the preceding sentence.

In the application of residual funds to teacher salary schedules priority will be given to equalizing steps and to increasing the promotional differential and then the first and second differentials.

and not subject to negotiation and agreement?³⁴ The Union sought to extend collective bargaining to new aspects of educational administration, and the Board rejoined that such matters were reserved exclusively to the discretionary professional judgment and policy-making authority of the Board and of the Superintendent. The stalemate hardened on three principal issues.

The first area of concern was the assignment of teachers to special classes and duties. The Union contended that all teachers should be presumed to be equally qualified for assignment to classes for the intellectually gifted and to certain special nonteaching positions (such as student guidance or counseling) carrying a lighter teaching load. It further maintained that the school's principal should have no discretion to make teacher selections on the basis of his judgment of relative qualifications; instead, assignments should be made only in accordance with seniority. To this, the Board answered that qualifications were indeed relevant, and that their determination was within the exclusive domain of the principal. The Union replied that qualifications for special assignments should be negotiated and included in the agreement.

Second, there was considerable debate about class size. The Union insisted on a commitment as to maximum class size based not on what was a reasonable working condition for teachers but rather on what produced the best learning conditions for children. That judgment, the Board maintained, was one of educational policy which was committed to the sole discretion of the Board and could not be negotiated.

Third, the crucial question of improvement of "difficult" schools

34. The issue was similar to, although the legal implications were different from, that presented by a proposal for a "management rights" clause in private industry negotiations. The first agreement between the Board and the teachers contained no so-called "management rights" clause. However, the area left open by law to the Board for negotiations had been indicated as follows by the Board in the preliminary referendum on collective bargaining conducted by the Board on June 12, 1961:

Various governmental agencies have in recent years voluntarily adopted modified forms of collective bargaining for government employees. These, because of the legal limitations and responsibilities placed upon governmental bodies, necessarily differ in certain essential respects from industrial collective bargaining.

In the case of the Board of Education, we are advised by counsel that such limitations would, under the present State laws, include the following:

(a) As to certain subjects such as, for example, matters relating to hours, working conditions, holidays, vacations and allocation of funds within the total appropriated, the Board is advised that it has substantial powers. As to others, its powers are limited, particularly those calling for the appropriation of public funds, since it may make only recommendations of the total amount believed necessary for budgetary purposes.

(b) As to those areas which, under law, are removed from the Board of Education's power, the Board of Education may commit itself to recommending any agreed action to the appropriate public agencies.

was raised. Late in the course of the negotiations, the Union submitted as a basis for negotiation and agreement a plan for the "effective" organization and administration of schools in low-income areas. The plan called for experimental educational policies and instructional programs. Component features of the proposal included the selection of teachers, principals, and superintendents "with the advice and consent" of the Union, and joint faculty-supervisor administration of the pilot schools. The Superintendent of Schools charged publicly that the Union was attempting to take over the administration of the schools, and he refused even to discuss the matter with the Union.

The clash over these issues led to the first serious breakdown in the teacher-Board relationship. Threats of strike were heard once more. This time the Union's leadership warned that, like freedom riders and other civil rights protesters, they would defy what they regarded as an unconstitutional state law prohibiting strikes by public employees.³⁵ The seriousness of these issues to both sides derived in large part from the Union's insistence that the desired changes be written into the collective bargaining agreement under the section on teacher "working conditions." In this way the changes would be subject to the full scope of the grievance procedure, including arbitration. For the Board, this meant compounding its delegation of authority to make educational policy—first, to the Union in the agreement, and then, possibly, to a third-party outsider. The Board was willing to enter into discussions with the Union on the questions of qualifications for teacher assignments and class size, but it reserved the right to make its own policy decisions on these subjects. The Board did offer, however, to incorporate its final policy determinations in a superintendent's circular to be distributed to all the schools. Complaints of arbitrary departure from the policy prescribed in this circular would then be subject to the agency steps of the grievance procedure, but not to arbitration.³⁶

With the aid of a mediation panel, the Board and the Union fi-

35. The reference was to the modified Condon-Wadlin Law, passed in the 1963 session of the State Legislature and to remain in effect until July 1, 1965. Law of April 23, 1963, ch. 702, §§ 1, 2, [1963] N.Y. Laws 2432, *amending* Law of March 27, 1947, ch. 391, [1947] N.Y. Laws 842 (repealed 1967). The principal changes made were a reduction in the tenure and promotion forfeitures imposed on individual employees for striking, the imposition of monetary fines for striking, and the strengthening of enforcement procedures.

36. The term "grievance" was defined to cover two types of complaints: (1) "a violation, misinterpretation or inequitable application of any of the provisions of this agreement"; or (2) unfair or inequitable treatment "by reason of any act or condition which is contrary to established policy or practice governing or affecting employees." 1965-1967 Agreement, *supra* note 11, art. VII, § A (emphasis added). Only the first type of complaint was subject to arbitration.

nally resolved the foregoing issues on the eve of the opening of school. The parties negotiated those elements of the basic demands which primarily concerned teacher working conditions and included them in the collective bargaining agreement. For example, the Board conceded that a class might be so large as to constitute an undue physical burden on a teacher. In that sense, class size could be regarded as a "working condition" subject to negotiation to determine the maximum number of pupils which a teacher could reasonably be required to handle.³⁷ Since class-size limitations became part of the working conditions section of the contract, any claimed departure from those limitations was subject to all phases of the grievance procedure, including arbitration. On the other hand, teacher assignments and qualifications for assignments remained within the discretion of the school principals. Still, the parties devised special procedures to promote fair and objective selection of teachers for coveted non-teaching assignments carrying a lower teaching load. Under these provisions, seniority was to be the controlling factor only where qualifications, as determined by the principal, were equal. In order to preserve its discretionary and policy-making authority, the Board insisted that teacher programs and assignments be covered in a separate article of the contract entitled "Statement of Policy." This special article expressly provided that its provisions were deemed to be a part of "established policy and practice" within the meaning of the definition of "grievance."³⁸ This meant that complaints of arbitrary or discriminatory application of the policy were subject to the agency steps of the grievance procedure—but not to arbitration.

On questions of teacher recruitment and the improvement of difficult schools—essentially matters of school administration and educational policy—the Union ultimately demanded a medium for expressing the views of the majority of teachers, even if not through the normal channels of collective bargaining. The critical stalemate over that issue was resolved when the Board agreed to establish a system of periodic joint *consultation*—not negotiation—be-

37. For a description of the Union's strategy on its class-size negotiations and the meaning it placed upon the final outcome by the then director of organization for the United Federation of Teachers, see Selden, *Glass Size and the New York Contract*, PHI DELTA KAPPAN, March 1964, at 283.

38. The Statement of Policy contained the following introduction:

Following discussions with the Union, the Board, exercising its authority under the Education Law to manage and administer the school system, adopted the following policies, which are deemed to be a part of "established policy and practice" within the meaning of the definition of "grievance" contained in Section A, Article VII, of this agreement to the extent that such definition is otherwise applicable.

1963-1965 Agreement, *supra* note 10, art. V.

tween the Superintendent of Schools and the Union on educational matters of mutual interest and concern. This meant that the Board, while reserving to itself the final decision in these matters, would permit the Union to press its position in separate discussions away from the bargaining table. The parties expressed this new consultative role for the Union in a formal declaration included as a "Preamble" to, but not a part of the substantive terms of, the second collective bargaining agreement. In the "Preamble," the Board of Education and the Union "recognize that they have a common responsibility beyond their collective bargaining relationship," and they "declare their mutual intent to work together toward the achievement of common aims of educational excellence." For this purpose, they agreed to "meet and consult" once a month during the school year "on matters of educational policy and development." One of the specific subjects of joint consultation was the development of a program for the improvement of "difficult schools."³⁹

A related clash of positions demonstrated another limitation on the scope of collective bargaining in public education. The Union demanded that the agreement include specific provisions concerning the length of the school year, the length of teacher vacations, and related matters, all of which the Board had previously regulated by means of bylaw. The Board conceded that these matters had a direct bearing on working conditions but insisted that they were essential to its discretionary authority to manage the school system and hence could not be bargained away for a fixed period. The Union then sought definite assurance that the existing bylaws would not be changed during the term of the agreement; accordingly, it asked that the provisions of the bylaws be incorporated into the contract. The Board, asserting its continuing legal obligation to govern the school system according to changing educational needs, refused to yield the freedom to amend its bylaws when necessary. One salient example of the need for continued flexibility, the Board suggested, was the possibility that the school year would have to be lengthened or varied to make up for lost school time due to teachers' strikes. In the end, the parties resolved the dispute by narrowing the subjects of controversy to sick leave, sabbatical leaves, vacations, and holidays. The Board expressly agreed that it would continue its "present policy" as to these subjects, "except insofar as change is commanded by law."⁴⁰

So critical to both sides were the implications of the fundamental

39. 1963-1965 Agreement, *supra* note 10.

40. *Id.* art. XIV.

issues resolved in the second round of negotiations that a serious public dispute arose between the Board and the Union as to what the one had yielded and the other had won. The parties met this threat to the completion of a final agreement by adding to the contract an epilogue entitled "Conclusion." This conclusion, reproduced here in part, provides significant internal evidence of the serious struggle which characterized the second phase of the bargaining history:

In a field of collective bargaining which presents new and unresolved problems, the parties have successfully defined the proper area of interest on the part of the teachers in their rates of pay and conditions of work while providing simultaneously a mechanism for the teachers through their union to convey to the Board their views based on their knowledge and experience on matters of educational policy and professional concern. This agreement provides terms and conditions for the joint relationship which will redound not only to the benefit of the Board and teachers but more particularly to the students as well. At the same time it makes clear that the Board has complete authority over the policies and administration of the school system which it exercises under the provisions of law and in the fulfilling of its responsibilities under this agreement.⁴¹

The second agreement, eighteen printed pages longer than its predecessor, was not signed until February 10, 1964.

IV. THE THIRD STAGE: MATURITY AND UNION POWER

By the early winter of 1965, when negotiations commenced for a third agreement, collective bargaining had become the accepted technique for determining the salaries and working conditions of New York City teachers. The grievance procedure had become the principal mechanism for resolving complaints by teachers that they were not receiving the benefits assured them by the collective bargaining contract or by established practice.⁴² When the grievance process failed, the Union submitted numerous cases to arbitration for final and binding decisions by neutral third parties chosen by both sides.⁴³

The process of regular joint consultation on a year-round basis added a new and broader dimension to the teacher-Board relationship. Through this process the Union became a truly powerful force

41. 1963-65 Agreement, *supra* note 10.

42. By the end of the school year in June 1965, 285 grievances had been filed at the last agency step of the grievance procedure.

43. Twenty cases were taken to arbitration by the end of the school year in June 1965.

in school administration. The earliest product of joint consultation was the completion, through a joint committee, of the "More Effective Schools Plan" (MES), which was put into operation in a few schools on an experimental basis.⁴⁴ As a further aspect of the Union's new role in administrative and policy matters, it participated in planning the Board's internal procedures for administering the provisions of the collective bargaining agreement. Moreover, it appeared before school administrators and Board committees on the issuance of new licenses, the creation of new positions in the schools, and other matters of educational import. During this period the Union also awoke to its responsibility to enforce that provision of the contract under which the Board undertook to make no changes with respect to "matters not covered by this agreement which are proper subjects for collective bargaining" without "appropriate prior consultation and negotiation with the Union."⁴⁵ On several occasions, the Board withdrew items appearing on the calendar for action at a public meeting upon the Union's insistence that the matter was a proper subject for collective bargaining and that "prior consultation and negotiation" had not taken place.⁴⁶

In the negotiations for a third agreement, the Union fared well in its salary demands and in obtaining other benefits for the teachers. Thus, the third contract made benefits less conditional on budgetary limitations. It afforded regular substitute teachers,⁴⁷ who had limited rights under law and a tenuous hold on their employment, rights of assignment under uniform and objective procedures and a reasonable measure of job security. Moreover, the new contract accorded regularly appointed teachers, generally unable to transfer to another school except through personal arrangements, the benefits of a transfer plan based on reasonable standards to be uniformly applied. It made the grievance procedure less formal, and opened recourse to arbitration for some complaints based upon policy provi-

44. See text accompanying notes 71-77 *supra*.

45. 1963-1965 Agreement, *supra* note 10, art. XIV.

46. An example of an item withdrawn from a public calendar upon protest by the Union at a public meeting was a proposed resolution for commencing the 1966-67 school year two days earlier than usual and requiring teachers to report for duty two days earlier than in prior years. The Union claimed that the proposal would, in fact, shorten the summer vacation of teachers and hence would violate that part of the agreement in which the Board undertook "to continue its present policy with respect to . . . vacations." See text accompanying note 40 *supra*. The Board took the position that its interpretation of the language in question permitted the proposed action. It asked the Union to take the matter to arbitration under the grievance procedure. The Union refused and threatened to keep the teachers out of school on the two days of proposed early reporting. The Board subsequently abandoned the proposal.

47. These teachers constituted about one-third of the teaching staff.

sions of the agreement. In addition, the contract expanded the classroom teacher unit for which the Union had obtained recognition to include those who served in part-time teaching programs conducted by the Board.⁴⁸

But much more was at stake in the third set of negotiations than just wages and teacher benefits. The new theme in forging the third agreement was enhancement of the Union's *status* in the schools and in the school system. By now the Union was representing more than 45,000 teachers in the day-school system, and thousands among them who were serving in additional part-time assignments, as well as other units of collateral pedagogical employees.⁴⁹ The Union was seeking security for itself as an organization; it wanted the prestige and power which would attract and retain a growing membership. Accordingly, it asked the Board for the favored treatment that would give it that prestige and power. In short, the Union was seeking some of the incidents and advantages of exclusive representation which were already commonplace in private employment but which had not been completely accepted in the public sector. In part, this difference between the public and private sectors was due to conflict between the principles of the merit system and the closed shop or union shop.⁵⁰ In part, it was due to the generally recognized obligation upon government to spend public money only for public purposes.

In its earlier agreements, the Union had obtained some of the more common privileges attendant upon exclusive bargaining status.

48. The broadened unit included, in addition to all classroom teachers in the regular day school instructional program, "all those employed as per session teachers." 1965-1967 Agreement, *supra* note 11, art. I. The new grouping, among whom the Union had established majority representation, was composed of all those who were employed as teachers in one or more of the numerous after-school, evening, and summer programs conducted by the Board of Education.

The designation of "per session" teacher derives from the fact that each work period, consisting of a stated number of hours, is known as a "session," for which teachers are paid a "per session" rate. Except for a small number of teachers in summer day camps and in evening adult classes, the per session assignments are held by day school teachers. At the time of the third agreement, a number of these teachers were multiple per session jobholders filling after-school, evening, and summer positions. The Board pondered the wisdom of extending bargaining rights for these extra jobs and then decided to treat the group as though they were separate, regularly employed, part-time workers. The Board was thus involved in negotiating separate sets of working conditions for the same employees—as though they were in fact different persons than those employed in the day schools.

49. Attendance teachers, psychologists and social workers, school secretaries, guidance counselors, and laboratory assistants—totaling approximately 4,000 employees as of that time.

50. The Federal government's position was clearly stated in PRESIDENT'S TASK FORCE, *supra* note 22, at 25:

The Task Force wishes to state its emphatic opinion that the union shop and the closed shop are contrary to the civil service concept upon which Federal employment is based, and are completely inappropriate to the Federal service.

Thus, it had obtained the exclusive use of at least one bulletin board in each school "for purposes of posting material dealing with proper and legitimate Union business."⁵¹ The Board had accorded a limited number of leaves of absence without pay but with service credit for salary increment and retirement purposes to teachers who were officers or staff members of the Union.⁵² While union activity on working time was prohibited, the Board had assured members of the Union's negotiating committee and its special consultants that they would be excused "without loss of pay" for working time spent in negotiations with the Board or its representatives.⁵³ At the individual school level, organized by the Union as a "chapter," prior agreements had granted the following perquisites of exclusive bargaining status: chapter chairmen were allowed "reasonable time during school hours" to investigate grievances;⁵⁴ meetings of the school chapter were permitted within the school "under circumstances which will not interfere with the instructional program";⁵⁵ and the principal of the school was required to meet with the chapter committee once a month during the school year "to consult on matters of school policy and on questions relating to the implementation of this agreement."⁵⁶

In the third round of negotiations, the Union did not demand any of the conventional union security clauses.⁵⁷ It sought the following forms of special treatment: First, it wanted the Board

51. This provision was contained in both of the previous agreements. 1962-1963 Agreement, *supra* note 3, art. X; 1963-1965 Agreement, *supra* note 10, art. X.

52. This provision was also contained in both of the previous agreements. 1962-1963 Agreement, *supra* note 3, art. VIII; 1963-1965 Agreement, *supra* note 10, art. VIII.

53. 1962-1963 Agreement, *supra* note 3, art. VII; 1963-1965 Agreement, *supra* note 10, art. II.

54. 1962-1963 Agreement, *supra* note 3, art. VI, § B(8); 1963-1965 Agreement, *supra* note 10, art. VI, § B(8).

55. This provision was not contained in the first agreement covering the 1962-1963 school year, but was incorporated into the second contract, 1963-1965 Agreement, *supra* note 10, art. XI.

56. This provision was first added in the second contract covering the 1963-1964 and 1964-1965 school years, 1963-1965 Agreement, *supra* note 10, art. XII.

57. Nor could it ask for the right of exclusive representation of all teachers in the unit in grievance prosecution and arbitration. Special legislation pertaining only to teachers, enacted by the state legislature in 1964 and presumably still in effect, had vitiated the exclusive representation right for grievance prosecution which had been given to the Union in prior agreements. This was accomplished by means of language stating that the representative of "the public school teacher" in the presentation of his grievance "shall be designated by the public school teacher at the time he presents his grievance or at a subsequent date." GEN. MUNIC. LAW, § 603-a (McKinney 1965).

The legislation was directed at a prior decision of the State Commissioner of Education that upheld the Union's exclusive right, as against any minority organization, to represent teachers under the grievance procedure prescribed in the first agreement. Matter of City Teachers Association of New York, Decision No. 7262 (Aug. 13, 1963). Hence, a teacher-grievant may select a minority organization to represent him in pursuit of the benefits negotiated in the agreement by the exclusive bargaining agent.

to abolish completely an established professional employee organization—the Policy Consultation Council—with which the Board had consulted for many years on various matters of educational and school policy. The Council was part of a Staff Relations Plan issued by the Board in 1956 following consultation with employee organizations and professional groups. In some structural respects, the Council resembled some of the company-devised employee representation plans encountered in private industry at an earlier time. The Union, insistent upon becoming the sole voice for teachers on matters of educational policy at the individual school level, also asked for the abolition of the Staff Relations Committees—the organs of the Staff Relations Plan at the individual schools. Such groups, the Union argued, were a threat to its exclusive bargaining status and should no longer be permitted to exist alongside a collective bargaining representative; even if, as the Board maintained, these groups were purged of all negotiating and grievance functions, they were still anachronisms whose survival could not be justified. The Union also sought favored status for the chapter chairman at each school. It asked the Board to make the office more attractive by arranging a lighter program of school duties for the chapter chairman in order to allow him more time during the school day for the tasks of his union office. Finally, and most significantly, the Union wished to administer unilaterally a welfare fund to which the Board was the sole contributor.

The Union won each of these demands either entirely or to a substantial degree. It won them on the theory that the privileges were an accepted perquisite of exclusive representation and that they would promote a stable and responsible collective bargaining relationship in the school system. The third agreement expressly stripped the Policy Consultation Council of all functions, and the Board undertook to adopt an appropriate resolution for its disestablishment.⁵⁸ The Staff Relations Committees were to be discontinued in any school where, as evidenced by valid check-off authorizations,⁵⁹ a majority of the faculty were members of the Union. Moreover, the agreement granted to chapter chairmen a stated num-

58. The supervisors were the dominant groups remaining in the Policy Consultation Council at that time. However, they had already formed another organization, the Council of Supervisory Associations (CSA), composed of constituent organizations of supervisors at various levels of authority. On May 5, 1965, in a joint "Memorandum of Agreement," the Board recognized the CSA as the exclusive representative of all supervisors eligible for membership in each of its constituent organizations and agreed to meet and consult with it "on matters of educational policy and development" and on the working conditions, salary schedules, and grievances of the supervisors.

59. The job was finished in the next agreement, when all remaining Staff Relations Committees were abolished.

ber of duty-free periods during the week for handling grievances and union business. The Union also acquired two additional leaves of absence for its teacher-officers or staff members.

But the grant of authority to administer unilaterally a welfare fund consisting entirely of Board contributions was the most unexpected concession to the Union. Welfare benefits were granted for the first time in the third agreement. That agreement stipulated that the Board would provide funds at the rate of 100 dollars per teacher per year during the first year of the agreement, and at the rate of 140 dollars per year during the second year, prorated on a monthly basis "for the purpose of making available for each day school teacher" supplemental welfare benefits "under a plan to be devised and established jointly by representatives of the Union and of the Board."⁶⁰ The details of the plan were to be left to later negotiation. The Board had earlier informed the Union of its intention to establish a welfare fund to be jointly administered under a plan whereby both sides would appoint trustees in a manner similar to the requirements of federal law for welfare funds in private industry.⁶¹ Such a plan would have been modeled after the administration of the welfare fund for employees of the City Transit Authority, an autonomous agency established for the City of New York by state law. After accepting the Board's earlier proposal, however, the Union learned that the New York City government had approved a standard welfare fund arrangement with unions representing its employees which provided for unilateral union administration and management. The United Federation of Teachers then insisted upon the City's standard unilateral arrangement. The Board, concerned about the public policy and legal aspects of the payments and of the unilateral union administration of the fund, sought the opinion of the New York City Corporation Counsel. The Corporation Counsel advised early in 1966 that the Board's contributions to the proposed welfare fund were for a proper public purpose and that the proposed arrangement for unilateral administration would not violate the Board's fiduciary responsibility in the expenditure of public monies. The Board thereupon entered into a supplemental agreement with the Union requiring it to pay into the "United Federation of Teachers Welfare Fund"⁶² the amounts specified in the third basic contract. The supplemental agreement provided that "the Fund shall be administered and managed by five Trustees, who shall be appointed by the Administrative Committee of the Union."

60. 1965-1967 Agreement, *supra* note 11, art. III, § E(2).

61. Welfare & Pension Plans Disclosure Act, 29 U.S.C. §§ 301-09 (1964).

62. Hereinafter referred to as the "UFT Welfare Fund" or the "Fund."

The Union anticipated that the Board's contributions to the Fund during the term of the new agreement would reach a rate of eight million dollars per year for all units which it represented.

The strict accounting, auditing, and reporting requirements of this welfare-fund agreement, its controls on administration, and its emphasis on the fiduciary responsibilities of trustees afforded reasonable assurance against misuse of Board contributions. Thus, the Union's power did not turn on mere control over the disposition of large sums of money. The important thing was that new and highly valuable benefits were available to teachers through an administrative facility designated as "the United Federation of Teachers Welfare Fund." This undoubtedly afforded the Union the greater measure of prestige and power which it needed to gain and retain substantial numbers of new members.⁶³

While the benefits were expressly available under the collective bargaining agreement to all employees in the unit without regard to their membership in the Union, there is reason to assume that the impression was nevertheless created that membership was either a condition precedent to receipt of benefits or an advantage in their dispensation. The fact that the Fund was designated as the "United Federation of Teachers Welfare Fund" might reasonably have led the uninformed to suppose that the Union was actually expending its own money and hence would limit its largesse to its members. The Union's simultaneous grant of additional benefits from its own funds to union members only might well have heightened the confusion. Even those who understood that the Board provided the contributions to the "UFT Welfare Fund" might still have been uncertain as to whether nonmembers were intended beneficiaries; nor would it be unreasonable for them to assume that the disbursement of Board funds controlled by the Union might tend to favor union members.

The Union's administration of the Fund at the school level tended to strengthen the association in some teachers' minds between eligibility for welfare benefits and union membership. Thus, the chapter chairmen at the individual schools were the sole distributors of benefit application and fund enrollment forms. Employees complained to the Board of Education that the chapter chairmen in some schools gave the necessary forms only to union members.

63. For a discussion of the importance of this Fund to the Union, *see* Foreword, Message from the Chairman of the Board of Trustees, in *Health and Welfare Benefits* (published and distributed to New York City Schools by the Union): "New York City teachers are justly proud in the achievement represented by the United Federation of Teachers Welfare Fund. The United Federation of Teachers Welfare Fund is an historic first. It is the first teacher welfare fund in the history of American education."

Schools having no union members, and hence no chapter chairman, were overlooked initially. Moreover, chapter chairmen were responsible for distributing literature on welfare-fund benefits, initially to all employees in each school and then regularly to new employees. Those unaccustomed to careful textual scrutiny may well have wondered whether union membership was not a condition of access to the valuable coverage described in the publications. The lack of clarity stemmed from the language of the basic booklet, which was entitled "Health and Welfare Benefits" and subtitled "For members of the fund and their families/UFT Welfare Fund." In its opening statement, the booklet asserted that all employees for whom the Board contributes money to the "UFT Welfare Fund, are hereinafter referred to interchangeably as 'covered employees', members of the Fund, or members." While the term "members" was thus technically tied to the Fund, its usage in connection with the availability of particular benefits may have led some teachers to believe that the term referred to union membership.⁶⁴ Although the Board brought to the Union's attention complaints by nonmembers of their disparate treatment by chapter chairmen, and even though the Union investigated and corrected instances of discriminatory action, it can scarcely be denied that the Union retained a fundamental advantage in its unilateral administration of the welfare fund. Indeed, the October 7, 1966, issue of the Union's official publication reported a "startling jump" in membership in the first month of the new school year.⁶⁵

V. THE FOURTH STAGE: THE EMERGENCE OF PUBLIC-INTEREST ISSUES PECULIAR TO THE ENTERPRISE

The negotiations for the fourth, and current, agreement between the teachers and the Board emphasized the fundamental importance of the public-interest factor in public employment bargaining. Two basic components of the public-interest factor had, of course, appeared in earlier negotiating encounters: setting priorities among

64. As an example of the later carry-over of the special term "member" to other literature, several statements in the Fund News (published and distributed to all schools in February 1968) explained that new benefits made possible by the fourth agreement with the Board would be granted to "our eligible members," or to "members," or to "the eligible employee-member." The Board received a number of inquiries from some employees seeking clarification of eligibility for the benefits and from others complaining of the exclusion of nonmembers of the UFT from the new benefits.

65. United Federation of Teachers, UNITED TEACHER. Other issues showed that membership increased by 8,000 from September of the first year of the third agreement to December of its second year.

competing demands upon available Board funds for the administration of educational programs and the general operation of the school system; and separating the realm of wages, hours, and working conditions from the domain of governmental policy and public management.

The first public-interest component concerns the public agency's judgment as to what part of its total budget it can conscientiously commit to employee gains and benefits consistent with the public interest. In collective bargaining on economic demands—wages, fringe benefits, and working conditions—the Board has repeatedly asserted that its first concern in the fiduciary allocation of public funds must be the “good of the children.” The Union's typical reply has been: “Teachers want what children need.” In the end, the public has acquiesced in the final budgetary allocations for teacher gains and benefits—an acceptance based either on the perceived value of economic benefits as forces in educational improvement or on their worth in avoiding the educational and social hazards of a deferred school opening.

The second public-interest component is more fundamental: how can bilateral collective bargaining be limited in scope to matters directly affecting the employment relationship? How can it be kept from intruding upon the essential mission of a governmental agency such as the Board of Education, which has been entrusted with a nondelegable duty to design and operate an educational system in the public interest? As noted earlier, the precise scope of collective bargaining has not been easy to define. Previous differences have been resolved when the Union withdrew certain items from the bargaining table, when the Board ceded some of its authority in twilight-zone disputes, or when the parties devised other mechanisms of union participation, such as consultation and discussion. It was during the negotiations for the fourth agreement, however, that the sharpest and most stubborn public-interest conflicts emerged.

By the winter of 1967, the Board and parent and community groups had become persuaded that the improved working conditions granted to teachers in past agreements had impeded the attainment of higher educational goals for children. At the center of their concern were the children in the “special service schools” located in the low socio-economic areas of the city. For these children, learning sights and educational achievements were concededly low. The Board was convinced that the interaction of three factors—a general teacher shortage, inability to recruit a conscientious career staff, and unrealistic working conditions prescribed by prior collective bargain-

ing agreements—was hampering its efforts to provide a better education where it was needed most. In order to attract competent and experienced teachers to special service schools and retain them there, the Board had previously agreed with the Union to reduce the amount of teaching time required of teachers during their six and one-third hours of daily attendance in those schools; it had correspondingly increased the number of preparation periods. The third agreement had granted to teachers in the special service elementary schools two additional preparation periods per week (for a total of four) during which they were relieved of teaching duties and were expected to devote themselves to unsupervised and unassigned professional tasks. In the special service junior high schools, the Board reduced teaching time from twenty-four to twenty-two forty-five minute periods per week and increased preparation periods from six to eight per week. Three other provisions of past agreements also contributed to the Board's dilemma: the increase in the number and succession of paid sick-leave days for regular and substitute teachers for which no authenticating physician's certificate was required; the commitment to relieve teachers of teaching duties during preparation periods—except in an "emergency"; and the agreement to give teachers general control over the use of their preparation periods.

The practical impact of these four categories of improved working conditions on the education of children in special service schools became evident during the second year of the third agreement. The effect of the reduction in teaching time was to require the Board to increase the number of teachers in each school at a rate sufficient to provide each child with a full day's instruction. This meant recruiting several thousand new teachers. The system's experienced teachers did not find the lighter teaching schedules a sufficient inducement to lure them into the special service schools. Hence, the Board had to tap whatever sources of new teachers were available outside the school system. The tremendous expansion in staff brought to many special service schools untried and unseasoned recruits as well as a large number of casual or transient substitutes unwilling or unprepared to qualify for regular appointment. At best, the staffs which were recruited for these schools were often inadequate to the educational challenges presented. Nor was there any time during nonteaching periods which the Board could utilize for sustained teacher training and orientation. Still worse, the comparative rate of staff absenteeism for alleged illness increased markedly in these schools—particularly on the days preceding and following

week-ends and holidays. If the principal exhausted the roster of neighborhood substitute teachers willing to "fill in" on a daily basis, he was forced to assign other teachers in the school to "cover" the teacherless class. For the children, the excessive absences meant intermittent breaks in the continuity of their badly needed instruction. For the teachers who were required to "cover" the teacherless class, it meant the reluctant surrender of one or more highly prized preparation periods.⁶⁶ Faced with these consequences, the Board became convinced that the four types of teacher benefits negotiated in the third contract were in fact educationally unprofitable and that their monetary cost could be put to substantial productive use if diverted to other needs of the system. Accordingly, it appeared to the Board that a return to pre-existing conditions and the introduction of new restrictions might be a partial answer to its dilemma.

To achieve its own goals and to meet the objections of parent groups, the Board prepared a set of demands incorporating proposals for changes in the new agreement which would, among other things: (1) increase the number of teaching periods and reduce the number of preparation periods in the special service elementary and junior high schools; (2) reduce the number and succession of paid sick-leave days for which no authenticating physician's certificate was required; (3) revise the transfer plan to encourage transfers of experienced teachers to schools having a low experience index; (4) require teachers to attend training and orientation courses after school hours and during their preparation periods; and (5) favor the novice teacher with less difficult class assignments. The Union, on the other hand, sought a further reduction in teaching time at all levels and an expansion in the number of nonteaching preparation and professional periods,⁶⁷ such nonteaching time to be used at the complete discretion of the teacher. As compensation for loss of preparation periods because of teacherless classes, or for any other reason, the Union requested the Board to contribute to the welfare fund "at twice the maximum hourly per session rate for the time lost." Moreover, the Union wanted five additional days of paid sick-leave allowance and the complete abolition of the need for an au-

66. While teacher grievances on loss of preparation periods for class coverage were not sustained because of the "emergency" nature of the assignment, an arbitrator nevertheless observed that a continuing state of emergency due to teacher shortage might not be a valid defense to excessive class coverages. He suggested better planning for recruitment.

67. The "professional" period is a period in which the teacher is relieved of an administrative assignment, as differentiated from a "preparation" period in which the relief is from teaching duties.

thenticating physician's certificate. It also sought five additional days per year of paid leave for "personal business."

The clash of positions on these and other public-interest issues remained persistently intractable through three separate phases of mediation efforts conducted successively during the period following expiration of the third agreement on June 30, 1967.⁶⁸ Among the public-interest differences were two which proved to be particularly divisive: the problem of the so-called "disruptive" pupil and the controversy over the More Effective Schools program (MES). The conflict over these issues illustrated again how difficult it is to separate the realm of collective bargaining from the domain of governmental policy-making, and how delicate the balance is between the pull of public-interest concerns and the force of special group demands.

The Union submitted for incorporation in the fourth agreement a new section entitled "A Program To Remove Disruptive Children from Regular Classrooms." The proposal consisted of three subsections, which respectively recited the objectives of the program, set forth procedures for the effectuation of those objectives, and defined the role of the Union and the specific responsibilities of the Board to the Union. The principal objective was to vest in the classroom teacher a major share of the discretion to decide whether a child's behavior was so "disruptive" as to warrant his transfer from a regular classroom to other facilities more "appropriate" to his educational needs. The subsection on procedure began with the statement, "A teacher may exclude from his class a child whose behavior is causing serious disruption in the classroom." It then set forth the following three grounds for the exclusion of a "disruptive" child: (1) "Endangering the health and/or safety of (himself and) other children (*e.g.*, fighting, smoking)"; (2) "Intimidation of the teacher and/or fellow students"; and (3) "Inciting to violence." Finally, the subsection described the steps to be pursued following a child's exclusion from the classroom. These steps included a report by the teacher and a conference between the teacher and members of the school's behavioral and supervisory staff to plan the necessary remedial measures. The subsection called for an interview with the child and a meeting with his parents, both in the presence of the teacher. It also prescribed mandatory remedies of permanent removal from the teacher's class or of suspension from the school under specified

68. The Union submitted altogether 670 demands on which over 100 negotiating sessions had been held by the expiration of the agreement on June 30, 1967; by then, an accord had been reached on only a few items.

circumstances. The teacher was to have the right "to be accompanied by a United Federation of Teachers representative through all phases of this procedure."⁶⁹

The Union's policy justification for the demand was that the behavior of disruptive children in some of the city's "difficult" schools so seriously undermined the stability of the normal classroom situation as to make it almost impossible for the teacher to teach and for other children to learn. The Union's explanation for placing the subject on the bargaining agenda was that violence and threats of violence by pupils against fellow-students and teachers, as well as other types of unmanageable pupil conduct, were so widespread as to affect seriously the working conditions of teachers. The Union claimed that the Board had no effective central policy for dealing with the plight of the teachers and that school administrators were consequently unwilling to remove disruptive pupils from regular classrooms and place them in other facilities. The Union saw the teacher as the victim of a grave injustice against which he had no recourse and no effective remedy. Hence, the Union sought to negotiate both the procedure of the recourse and the substance of the remedy; in so doing, it placed the greatest emphasis upon the teacher's right to take the initial self-help step himself and then to participate in all phases of the decision on the ultimate outcome.⁷⁰

To the Board, the proper placement of the disruptive child in the school system was a matter of educational policy. And the role of educational policy maker, the Board insisted, could not be ceded to an individual teacher or to an outside body. Moreover, the Board did not share the Union's view that the teacher was necessarily an innocent victim of antisocial pupil habits in the classroom. The Board suggested that a poor or inexperienced teacher might well generate disruptive behavior because of inability to establish the relationships with pupils necessary to command their respect and retain attention. Parent groups shared the Board's views and foresaw in the Union's plan the possibility of placing in the hands of weak or hostile teachers the power to determine the educational fate of children already in need of intensive instructional care. As the negotiations reached the second mediation phase, the Board offered to prepare, in consultation with the Union, a Superintendent's circular

69. The Union's proposal was a modified version of a provision obtained by its sister American Federation of Teachers Local in Detroit, Michigan, in the latter's 1966-1967 collective bargaining agreement.

70. The dispute was essentially over the so-called unmanageable or disruptive child, as distinguished from the pupil who engages in acts of violence against the teacher or a fellow student. The Board had a definite policy covering acts of violence.

for school administrators which would establish appropriate procedures for handling serious student behavior problems. The Board was not willing, however, to make the circular or its procedures contractually binding. For its part, the Union indicated a willingness to have an outside panel on which the Union would be represented make the final decision on the disposition of the pupil, but it stood firm in its demand to negotiate the procedures and include them in the agreement.

A similar stalemate developed around the MES program.⁷¹ The Board had adopted the program in 1964 for a limited number of elementary schools as an experiment in elevating pupil achievement levels in slum areas through changes in school organization and structure. Briefly stated, the salient features of the plan for each school included: a relatively small total number of pupils, reduced class sizes, an increased ratio of classroom teachers and guidance counselors to pupils, additional small-group instruction, increased funds for educational materials and school supplies, and frequent consultation between faculty and administrators on teaching and supervision goals and techniques. Moreover, each school was to have on its staff a full-time team of experts in pupil-personnel services—psychologist, social worker, attendance teacher, speech therapist, and community coordinator. Apart from the obvious improvements in working conditions afforded teachers by the experimental MES design, the plan offered them additional advantages in the form of more preparation periods, freedom from secretarial tasks, freedom from nonteaching duties, and the ability to hold conferences during school hours. The Union regarded itself as the real architect of the fundamental design of the plan. It had looked upon the plan as the best “school-by-school approach to the problem of providing schools which can really educate children in spite of any environmental handicaps they may bring to school with them.”⁷² It also viewed the plan as a model for other city school systems faced with the challenge of achieving academic and social progress for their children. As noted above, the Union had in 1963 insisted upon placing its proposals for the improvement of “difficult” schools on the bargaining table.⁷³ The Board’s position at that time was that the subject was not within the ambit of collective bargaining. The parties re-

71. See text accompanying note 44 *supra*.

72. See AMERICAN FEDERATION OF TEACHERS, EFFECTIVE SCHOOLS FOR ALL CHILDREN (1964); AMERICAN FEDERATION OF TEACHERS, THE MORE EFFECTIVE SCHOOLS PROGRAM IN NEW YORK CITY (1964).

73. See text accompanying note 68 *supra*.

solved the dispute through the mechanism of a "Preamble" to the agreement which provided for regular joint consultation sessions between the Union and the Superintendent of Schools. The MES program grew out of those joint consultations.

Twenty-one MES program schools were in operation when the parties began their negotiations for a fourth agreement. Now the Union asked that "every elementary school located in a ghetto or disadvantaged area of the City shall be made a More Effective School." This would mean the reorganization of about 300 elementary schools in accordance with the MES plan. The Union also sought from the Board a definite contractual commitment in behalf of the expanded program, together with assurances that the Board would not modify the elements of the program without the concurrence of the Union. While not unaware of the substantial improvements in working conditions that would inure to teachers from expansion of the plan, the Board saw the fundamental issue as one of educational policy affecting children—an area of decision-making in which parents and the community had the greater stake. The Board consequently took the position that the bargaining process was not the appropriate technique for formulating educational programs of this type, and that a collective bargaining agreement was not the suitable medium for recording them. Moreover, although cognizant of the Union's commitment to MES as its special professional contribution in the search for an answer to the ghetto school problem, the Board was not convinced that the twenty-one-school experiment was demonstrating its cost effectiveness. In the Board's view, other Board-instituted programs aimed at developing the learning abilities of children in the early school years held greater promise for a larger number of children at a lower comparative cost. As the negotiations ground through the second mediation phase, the Board indicated its willingness to assure the Union that it would not reduce the number of schools then involved in the MES program, and that it would not modify the elements of the existing programs without prior consultation with the Union.

A special mediation panel named by Mayor Lindsay⁷⁴ attempted from mid-August to one week before the opening of school in September to provide a basis for a peaceful resolution of the critical public-interest issues still in dispute: teaching time, preparation time and its use, teacher training, absence allowances, the disruptive pupil, and MES. In its report to the Mayor on September 4, 1967,

⁷⁴ The panel was composed of Professor Archibald Cox, chairman, Professor Walter Gellhorn, and Dean Russell D. Niles.

the panel made the following recommendations as to all matters other than the disruptive pupil and MES:

- (1) The number of preparation and other nonteaching professional periods should remain unchanged.
- (2) The assignment of a teacher to "cover" a teacherless class should be recognized as a proper "emergency" measure provided that compensatory time be given for preparation periods (beyond a stated minimum) lost by reason of such assignment.
- (3) Preparation time and other professional nonteaching time should be subject generally to the teacher's control, except that a new teacher without prior professional experience could be directed during his first year of employment to devote "a reasonable number of his preparation periods, not to exceed twenty, to observing classes conducted by more experienced teachers or to consulting others familiar with classroom problems."
- (4) The existing sick leave provisions should remain in effect pending agreement on a new kind of leave plan proposed in the report. This new plan, the panel suggested, would not only reduce the opportunity for abuse and encourage the provident utilization of paid leave allowances, but would also eliminate a physician's authenticating certificate in most instances.
- (5) A new teacher without prior professional experience could be favored in classroom assignments and could be directed by the Superintendent of Schools to participate in an after-school training program for a specified number of hours during the year.
- (6) The teacher-transfer plan should be revised to take into account a better distribution of the more experienced teachers.

As to the disruptive pupil and MES, the mediation panel reported that, because of the complexity of the issues and the unusual and serious social considerations involved, it would be unwise to attempt to resolve the disputes "as part of crisis negotiations over the more conventional terms of a labor contract." The panel proposed, therefore, that each of the issues be settled on an interim procedural basis which, without prejudicing the rights of either party, would allow for continued study over a period of time by experts as well as by such interested persons as parents and other

groups who "cannot share in labor negotiations." The mediators contemplated as an interim procedural device the establishment of two separate special advisory committees composed of representatives of the Union, the Board, and the Mayor. These special committees would study separately the disruptive pupil and MES problems, consult with interested persons, and from time to time make recommendations to the Board. The panel noted that under this kind of interim disposition, the Union would not surrender any collective bargaining rights if, in the end, it were dissatisfied with the committees' proposals as to either of the matters under study.

On September 6, 1967, the Board accepted the mediators' report and prepared, as its last offer, a proposed new agreement incorporating the panel's recommendations. On September 10, the eve of the scheduled opening of schools, the Union membership rejected the Board's offer after the Union's officials had also turned it down. From September 11 to September 28, when the membership ratified the final proposed agreement, the City experienced the longest teacher strike in its history as of that time.⁷⁵ During the strike, the parties conducted further negotiations within the framework of the mediation panel's recommendations and under the watchful eye of the Mayor and two other mediators designated by him. The number of public-interest issues was reduced somewhat by agreement or by modification or withdrawal. The Union's position had now hardened around the following last-ditch residue of its earlier demands: (1) an additional preparation period per week in the special service elementary schools; (2) additional sick leave allowances and elimination of the need for a physician's authentication; (3) utilization of the nonteaching professional period in the junior high and high schools at the teacher's discretion; (4) specified procedures for handling the "disruptive" pupil; and (5) expansion of the MES program by contractual commitment.

In the end, a settlement was reached in which the Union achieved most of its final substantive demands directly affecting teacher working conditions, and the Board abandoned or modified its original stance in those areas. Thus, the Union won its fifth preparation period in the special service elementary schools, effective as of the second year of the agreement. But it yielded to the Board's

75. Six United Federation of Teachers units of pedagogical employees other than classroom teachers were also involved in the negotiations and in the strike. They were school secretaries, guidance counselors, psychologists and social workers, attendance teachers, laboratory assistants, and auxiliary (bi-lingual) teachers. Because each of these units had its own special interests, separate negotiations were conducted for each of them. This Article has considered only the classroom teacher unit.

insistence on using preparation periods and after-school time for training new teachers. The negotiators devised a new sick-leave plan under which a physician's certificate was required only after ten days absence for illness in any school year, as contrasted with the previous four-day limit. Nonteaching "professional" periods in the secondary schools were to be used at the teacher's discretion, but with certain exceptions.

The Board salvaged its position on the disruptive pupil when the Union agreed that the specific procedures both sides had worked out in the negotiations be drawn up as a "Special Circular" of the Board to be appended to, but not made part of, the contract. The special procedures agreed upon granted the teacher the right to initiate a complaint regarding a "disruptive" student with the principal of his school. Thereafter, the teacher could appeal unsatisfactory action to successively higher levels of administrative authority and to a specially constituted panel of Union, Board, and community representatives. But the final disposition of the case was to be made by the Superintendent of Schools. At the same time, however, the Board committed itself by way of a specific undertaking in the agreement not to change the procedures or policies set forth in the Special Circular without the consent of the Union. The Board also agreed that the circular would be subject to the grievance procedure and to arbitration only for the purpose of resolving complaints of failure to comply with the procedures prescribed in the circular—not to review the substance of a decision as to any individual pupil.

The parties resolved the MES issue by incorporating three paragraphs in the Preamble of the agreement. Essentially, these paragraphs declared that the Board would continue various specified intensive experimental programs for educational excellence, including MES, and that it would set aside a fund of 10 million dollars for the 1968-1969 school year "for the purpose of making further progress in the development of new programs for the elementary schools."⁷⁶ Moreover, a work group headed by an outside eminent educator selected by the Superintendent and composed of representatives of both sides and of parent or community groups would make recommendations to the Board and the Superintendent of Schools for the utilization of the special fund. However, not less than half the fund was to be used by the Board "for intensive programs for the reorganization and improvement of additional schools."⁷⁷

76. 1967-1969 Agreement, *supra* note 12.

77. *Id.*

On this basis the Union and the Board concluded the final agreement, and the teachers returned to their classrooms on September 29 for the commencement of the 1967-1968 school year. The parties and the public then settled down to what they expected to be a two-year period of quiet enjoyment of the fruits of the bargaining and the new phase of the bargaining relationship. As is well known, however, before that first year was over, warning signals were up for the most serious crisis in the history of the school system and the city community. That account must be left to another kind of chronicle or perhaps to the next chapter of this history, to be written when the fifth collective bargaining agreement has been concluded.

VI. CONCLUSIONS AND FUTURE DIRECTIONS

The history of collective bargaining between the New York City Board of Education and the United Federation of Teachers has brought into sharp focus the special problems inherent in any effort to adapt established industrial relations models to the public education enterprise. These problems are compounded when that enterprise is a vast urban school system comprised of large numbers of children in need of intensive instructional services. Essentially, two main types of problems and their attendant dilemmas have characterized this particular bargaining history: problems arising out of demands for so-called "bread and butter" economic items of primary benefit to the teachers—including salaries, fringe benefits, and improved working conditions; and problems arising out of demands for bilateral formulation of policies and standards relating directly to the education of children—ranging all the way from teacher qualifications for particular assignments, to placement of difficult children, to the expenditure of Board funds for experimental educational programs.⁷⁸

The dilemma presented by the first type of problem has been how to satisfy teachers' demands for increased salaries while at the same time meeting other educational and operating school system needs within budgetary limitations. The solution has often necessitated the reordering of priorities and the diversion of funds intended for other important educational services to teachers' salaries. While such a course may serve well the expediency of the moment, it

⁷⁸ See generally Wollett, *The Coming Revolution in Public School Management*, 67 MICH. L. REV. 1017 (1969).

places a progressively heavy strain on the Board's ability to fulfill its fundamental commitment to educational improvement.

The dilemma presented by the second type of problem has been how to retain in the Board the essential aspects of its public trust and mission to serve the legitimate interests of the community, while at the same time satisfying the Union's demands in order to avoid a deferred commencement of the school year. In this area, the solutions have been altogether pragmatic, dictated by the relative force of countervailing pressures at the moment. The result has been a progressive expansion of the process of joint decision-making to the point where the Union enjoys equal status with the Board in the formulation of those aspects of educational management having any impact, however slight, on teacher welfare or Union prestige. This has been the outcome even as to policy matters plainly outside the realm of collective bargaining; as to these matters, there has often been full bilateral negotiation and agreement even though the final accord has not actually been incorporated within the physical framework of the contract.

The emergence of these significant characteristics of the relationship between the Board and the Union raises two questions of overriding importance: (1) whether government as an employer can protect its exclusive policy terrain against invasion by the collective bargaining process once that process has been set in motion by a powerful employee representative; and (2) whether the resolution of public-interest issues in serious collective bargaining clashes can in fact be guided by the just and proper needs of the public and the community. These are challenges not only for the New York City Board of Education, but also for governmental employers generally—particularly those entrusted with functions in an area of great social concern.